IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.447 OF 2006

Punnappa Vithal Jamdar)
Age 40 years, Occ.:Nil,)
R/o.Valsang,)
Taluka South Solapur,)
District Solapur.) ...Applicant

Vs.

The State of Maharashtra) ...Respondent

Shri K.S.Patil for the Applicant.

Shri A.S.Shitole, A.P.P for the Respondent.

CORAM : ABHAY S. OKA, J.

DATE ON WHICH SUBMISSIONS ARE HEARD : OCTOBER 13, 2006.

DATE OF PRONOUNCEMENT OF JUDGMENT : NOVEMBER 08, 2006.

JUDGMENT:

1. By this Application under section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the said Code of 1973), the Applicant has prayed for suspension of execution and operation of Judgment and Order dated 30th January, 1984 passed in Sessions Case No.181 of 1983 by the learned Assistant Sessions Judge, Solapur. By the said Judgment and Order, the

Applicant was convicted for offence punishable under section 307 of the Indian Penal Code and was sentenced to undergo rigorous imprisonment for a period of five years and to pay fine of Rs.1,000/-. In default, he was directed to undergo simple imprisonment for six months.

2. With a view to appreciate the submissions which are made by the learned counsel appearing for the parties, it will be necessary to refer to the facts of the case. The aforesaid Judgment and Order was challenged by the Applicant by preferring Criminal Appeal No.163 of 1984. It appears that the said Appeal was admitted by this Court. At the time of admission of the Appeal, on 21st February, 1984, this court granted bail in favour of the Applicant subject to furnishing fresh bail bonds. However, prayer for stay regarding sentence of fine was rejected. By a further order passed on 22nd February, 1984, it was observed that since order of conviction has been passed by the learned Assistant Sessions Judge, the Appeal was maintainable before the Sessions Court. Therefore, this court transferred the Appeal to the

court of Session Judge, Solapur for disposal in accordance with law. This court continued order of bail granted at the time of admission of the Appeal. However, the learned Sessions Judge was granted liberty to pass such order for modification or otherwise as he may find necessary.

3. The Applicant (Appellant in the Appeal) preferred an Application for suspension of order of conviction being Criminal Misc. Application No.596 of 2004 before the Sessions Court. The contention which was raised in the said Application was that though the Appeal was transferred by this Court to the Sessions Court, the record of the Appeal was not traceable before the Sessions Court and for a period of more than 20 years, the Appeal could not be heard on merits. It was contended that as a result of order of conviction, the Applicant was suspended from his employment and the order of suspension continued for more than 20 years. By order dated 10th January, 2006 the learned 2nd Additional Sessions Judge, Solapur rejected the said Application. While rejecting the Application, the learned Additional Sessions Judge

observed that there was no evidence on record to show that papers of Criminal Appeal No.163 of 1984 were received by the said court. It was observed that the Application was not tenable unless the papers of the Appeal were placed before the Sessions Court. It was also observed that for the period of 20 years the Applicant remained silent and did not bring to the notice of the Sessions Court that the Appeal was not being heard.

4. When this Application came up before this court on 01st March, 2006, an order was passed directing the office to put up a detailed note after making inquiry as to whether papers of the Criminal Appeal No.163 of 1984 were sent to the Sessions Court at Solapur for disposal according to law. On 04th March, 2006 office made a noting that the Record and Proceeding of the case was not called for in Criminal Appeal No.163 of 1984 by this court. Noting further records that Criminal Appeal No.163 of 1984 was disposed of on 22nd February, 1984 and final Writ was issued to the Assistant Sessions Judge, Solapur on 23rd February, 1984. It is further recorded that the

said Writ was returned duly certified. In terms of order dated 08th September, 2006 a fresh report was submitted on 15th September, 2006 by the Assistant Registrar of the Criminal Department. The said report records that this court passed an order directing transfer of the Appeal to the Court of Sessions Judge, Solapur for disposal in accordance with law. It was noted that writ of the said order was issued to the Assistant Sessions Judge, Solapur. It was stated that except for the copy of the writ the other papers have been destroyed by the office. After considering the earlier note, this court on 28th July, 2006 passed an order directing the learned Sessions Judge, Solapur to trace papers and to submit a report as to the status of the Appeal pending before the said court.

5. The report dated 31st August, 2006 was received from the District and Sessions Judge, Solapur in which it was stated that File "A" and File "B" of the Sessions Case No.181 of 1983 were available in the office of the said court and papers of Criminal Appeal No.163 of 1984 were not received by the said court from this court.

6. The learned counsel appearing for the Applicant submitted that the order of conviction was passed on 30th January, 1984 and till today the Appeal preferred by the Applicant has not been decided due to no fault on the part of the Applicant. He submitted that the Applicant was working as a peon in a secondary school. He submitted that the Applicant was suspended on the basis of the order of conviction and sentence and as a result, the entire family of the Applicant consisting of his wife and five children has suffered. He submitted that this is a fit case for suspending the conviction. The learned A.P.P invited my attention to the finding recorded by the learned Assistant Sessions Judge and submitted that no case was made out for grant of suspension of conviction. He submitted that there is no prejudice to the Applicant as he is enjoying the order of bail from the year 1984. He submitted that the Applicant has made no efforts to ensure that the Appeal is heard. He submitted that order of reconstruction of the record may be passed.

7. I have considered the submissions. It is not in dispute between the parties that Appeal against order of conviction and sentence being Criminal Appeal No.163 of 1984 was admitted by this court on 21st February, 1984 and the Applicant was ordered to be enlarged on bail. There is also no dispute that by further order dated 22nd February, 1984 this court transferred the Appeal to the Sessions Court at Solapur for final disposal. There is no dispute about the fact that a writ was sent by this court on 23rd February, 1984 to the Sessions Court at Solapur communicating the order of transfer to the said court. However, from the report submitted by the office and from the few available papers of Criminal Appeal No.163 of 1984 which were produced before me, it appears that office of this court did not forward the memorandum of Appeal and its accompaniments to Sessions Court at Solapur. This is abundantly clear from the report received from the learned Sessions Judge, Solapur. There appears to be a serious lapse on the part of the office of this court. The office forwarded the writ of the order without sending the memorandum of the Appeal. With the passage of time

the memorandum of Appeal has been destroyed. As a result of failure of the office of this court to forward memorandum of the Appeal and its accompaniments to the Sessions Court, the said Court could not deal with the said Appeal for last more than 22 years. In fact such default on the part of the office calls for serious action to be taken against the erring employees. However, I am informed that almost all concerned employees have since retired and therefore, I am not adopting the said course.

8. As Appeal papers were not received by the Sessions Court, the Application made by the Applicant under section 389 of the said Code of 1973 was numbered as Misc. Application No.596 of 2004. In the said Application, the Applicant has quoted the order passed on 21st February, 1984 by this Court admitting the Appeal and granting bail in favour of the Applicant. Further order passed on 22nd February, 1984 of transferring the said Appeal to the Sessions Court is also reproduced in the said Application. A reply was filed by the Additional Public Prosecutor to the said Application in which the said factual aspects

have not been controverted. It appears that on the Application made by the Applicant, witness summons was issued to the record-keeper of the District and the Sessions Court at Solapur for production of papers of Sessions Case No.181 of 1983. On the said Application, summons was issued by the learned Additional Sessions Judge and alongwith an Application at Exhibit 12, on 26th July, 2005 record-keeper produced the record of Sessions Case No.181 of 1983. It is surprising that the Advocate for the Applicant was required to adopt such a course of issuing witness summons to an Officer of the Sessions Court for production of record of the case. Once it was brought to the notice of the learned Additional Sessions Judge that the Appeal which was transferred by this court to the Sessions Court was not decided for such a long time, the learned Sessions Judge herself ought to have called for the record of the Sessions Case.

9. Even after noticing that the Appeal papers were not received from this court, the learned Additional Sessions Judge has taken no steps. However, this court cannot remain silent spectator.

Hence, a direction will have to be issued for reconstruction of the record of the Appeal. The report of the Sessions Judge discloses that a part of the record of the Sessions Case is available. If depositions and other documents are not available, an effort will have to be made to reconstruct the said documents so that Appeal can be heard on merits.

10. Now the question which remains is about the prayer of the Applicant for suspension of conviction. In the case of **K.C. Sareen Vs. C.B.I, Chandigarh (2001(6) Supreme Court Cases Page 584)** the Apex Court held that power to suspend an order of conviction apart from the order of sentence, is not alien to section 389(1) of the said Code of 1973. The Apex Court, however, held that exercise of such power should be limited to very exceptional cases. Merely because convicted person prefers an Appeal for challenging the conviction, the court should not suspend the order of conviction. The court has a duty to look at all aspects including ramification of keeping such conviction in abeyance.

11. The question which is to be decided is whether present case can be said to be an exceptional case where power of suspending conviction should be exercised.

12. A copy of the Judgment in Sessions Case No.181 of 1983 is on record. As indicated earlier, the conviction of the Applicant is for an offence punishable under section 307 of the Indian Penal Code. The allegation of the prosecution is that on 08th May, 1983 at village Valsang, the Applicant gave a knife blow on the neck of the complainant Shri Laxman Chandrashekhar Mankoji. On night between 07th May, 1983 and 08th May, 1983 the complainant was sleeping on a platform on the house of one Iranna Rotte. One Shankar was also sleeping on the same platform. At about 2.15 a.m, the complainant was attacked by a person by knife on his neck. After the sudden attack, the complainant was awoken and he saw the accused running with a knife in his hand. According to the complainant he identified the accused in the light of an electric tubelight on the street. After recording finding of the guilt of an offence punishable under

section 307 of the Indian Penal Code, taking into consideration the circumstances of the case and young age of the Applicant, substantive sentence of rigorous imprisonment for five years was awarded. At the relevant time the age of the Applicant was 25 years. The order of conviction records that the Applicant was in custody from 08th May, 1983 to 12th May, 1983. On 21st February, 1984 this court granted bail in favour of the Applicant.

13. A copy of the Application made by the Applicant under section 389(1) of the said Code on 1973 and an affidavit in support of the said Application disclose that after conviction the Applicant got married and he has five issues. The fact that the Applicant is married and has five issues is not disputed in the reply filed by the State to the said Application. The main reason given by the learned Additional Sessions Judge for rejecting the Application is that the Application was not tenable unless the papers of the Appeal were before the said court. The learned Additional Sessions Judge also observed that there was no evidence on record to show

that papers of the Criminal Appeal were received by the said court. The learned Additional Sessions Judge has blamed the Applicant for not taking steps for a period of 20 years. Thus, it is apparent that the Application is not rejected on merits.

14. This is not a case where the Applicant was negligent. He did prefer an Appeal in this court immediately after order of conviction was passed. However, he was wrongly advised to prefer an Appeal in this court. This court admitted the Appeal and granted bail and later on transferred the Appeal to the Sessions Court. The Applicant cannot be blamed if there was failure on the part of the office of this court in forwarding the papers of the Appeal to the Sessions Court. The Applicant was not expected to take any steps in that behalf and it was the duty of the office of this court to forward the memorandum of the Appeal and other accompaniments alongwith the writ of the order to the Sessions Court. However, that was not done. It is true that from February 1984 till today the Applicant did not apply to the Sessions Court for reconstruction of the record and for hearing

of the Appeal. However, this is no ground to shift the entire blame on the Applicant. This is a case where the Applicant availed of the remedy of preferring an Appeal and the Appeal could not be heard for last more than 22 years due to default on the part of the office of this court. The order of conviction remained hanging over the head of the Applicant for last more than 22 years. I am informed that in normal course the Appeal should have been disposed of by the Sessions Court within a period of two to three years. Thus, there is a gross delay of atleast 19 years in disposal of the Appeal.

15. As of today, only a part of the record of the Sessions Case is available. The original memorandum of the Appeal is not available. If reconstruction of the record of the Sessions Case is possible, it is bound to take time. If reconstruction is not possible due to lack of availability of copies of the documents, a different course will have to be adopted by the Sessions Court. When the Sessions Court had received a writ of Order of transfer of the Appeal, it is surprising that after receipt of the writ, certain

files in the record were destroyed. Once writ was received from this court, though the memorandum of Appeal may not have been actually received by the Sessions Court, the Appeal was technically pending on the file of the Sessions Court. Care should have been taken to preserve the entire record of the Sessions case.

16. If this is the factual situation, the appeal cannot be decided in near future. The reconstruction of record is bound to take time. Thus, a very extraordinary situation is created in this case as a result of failure of the office of this Court to send the papers of the Appeal to the Sessions Court. Therefore, this case will have to be treated as an exceptional case as held by the Apex Court in the case of K.C. Sareen (supra). Considering the peculiar factual aspects of the case, the order of conviction will have to be suspended pending the decision in Appeal. Therefore, the Application must succeed.

17. Hence, I pass the following order:

(i) The learned Sessions Judge at Solapur shall reconstruct the record of the Appeal against conviction (Criminal Appeal No.163 of 1984 of this Court) against the order of conviction in Sessions Case No.181 of 1983 passed by the learned Assistant Sessions Judge, Solapur on 30th January, 1984. If a true copy of memorandum of Appeal is not available either with the Applicant or with the Public Prosecutor, the learned Sessions Judge will permit the Applicant to file a fresh memorandum of Appeal.

(ii) The learned Sessions Judge will also make an endeavour to reconstruct the record of the Sessions Case.

(iii) The aforesaid exercise of reconstruction shall be completed within period of four weeks from the date of receipt of writ of this order.

(iv) Till the disposal of the Appeal before the Sessions Court, the order of conviction and

sentence passed against the Applicant in the Sessions Case No.181 of 1983 by the learned Assistant Sessions Judge, Solapur will remain suspended.

(v) The learned Sessions Judge will endeavour to decide the Appeal as expeditiously as possible.

(vi) Office is directed to issue writ of this order forthwith to the Sessions Court. A copy of the writ be forwarded by fax and/ or e-mail to the Sessions Court at Solapur. The Sessions Court will forward a report of compliance by 18th December, 2006.

(vii) Place the Application on board on 19th December, 2006 for direction for reporting compliance as regards reconstruction of the record of the Appeal as well as the Sessions Case.

JUDGE